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IN THE

Supreme Court of the United States

October Term, 1959.

No. 341

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Transamerican Freight Lines, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above-entitled cause, affirming the decree of the Court of Common Pleas of Dauphin County, Pennsylvania.

Opinions Below.

The opinion of the Court of Common Pleas of Dauphin County is not reported.

The opinion of the Supreme Court of Pennsylvania is reported at 396 Pa. 64.

Jurisdiction.

The opinion and judgment of the Supreme Court of Pennsylvania was filed on May 28, 1959 (12a).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3):

(a) *Final judgment:* The judgment of the Supreme Court of Pennsylvania (18a) finally disposed of all legal issues raised by petitioner.

(b) *Highest State Court:* The Supreme Court of Pennsylvania is the highest court of that state in which a review of this decision could be had. See Sections 1 and 3, Article V, Constitution of Pennsylvania, Purdon's Pa. Statutes, Annotated, and 17 Purdon's Pa. Statutes Annotated § 41.

(c) *Validity of State Statute Drawn in Question on Federal Constitutional Grounds:* In its Appeal and Specification of Errors filed in the trial court (3a) petitioner specifically alleged that the state's attempt to force petitioner to pay the allegedly compensatory gross receipts tax of $13,547.68 for the same use of the Pennsylvania Turnpike for which petitioner had already paid the tolls of $109,324.88 required by the Turnpike Act to be fixed so that they will fully compensate the state for all costs of every kind incurred in construction, operation and maintenance of the turnpike, is "forbidden by the Commerce Clause of the Constitution of the United States" (6a).

In its opinion (12a) the trial court noted this contention (13a) and specifically held (16a) that "the tax settlement, based upon the turnpike mileage, did not violate the Commerce Clause of the Constitution of the United States."

The Supreme Court of Pennsylvania adopted as its opinion the opinion of the Dauphin County Court (12a) which, as stated above, specifically rejected petitioner's contention that application of the so-called compensatory tax to turnpike use, for which the state had already received full compensation, violated the Commerce Clause.

The order of the trial court, dismissing petitioner's objections based exclusively on the Commerce Clause of the federal constitution, was thereupon affirmed by the Supreme Court of Pennsylvania (18a).

Statutes Involved.

The relevant parts of the two statutes involved in this case are set out as an Addendum to this petition. Those statutes are:

First, the following provisions of the Pennsylvania Turnpike Act of May 21, 1937, P. L. 774, as amended:

Section 1, 36 Purdon's Pennsylvania Statutes Annotated § 652a, authorized the Turnpike Commission created by the statute to "construct, operate and maintain a turnpike at such location as shall be approved by the Department of Highways . . . and to issue turnpike revenue bonds . . . payable solely from tolls, to pay the cost of construction."

Section 3(d), 36 P. S. § 652c(d), defines the "cost of the turnpike" in comprehensive terms, including all costs of planning, financing and constructing the turnpike and placing it in operation.

Section 8, 36 P. S. § 652h, provides for the payment of the "cost of the turnpike" from the proceeds of the sale of revenue bonds and for retirement of the bonds from the fund created by collection of the tolls to be charged for the use of the turnpike.

Section 9, 36 P. S. § 652i, provides that the proceeds of the bonds shall be applied solely to the payment of the "cost of the turnpike" or to the appurtenant fund.

Section 12, 36 P. S. § 652(l) provides that:

(a) When the turnpike is put to use, all charges and costs of operation, maintenance and repairs shall be paid out of tolls;

(b) the Turnpike Commission is authorized to fix, revise and collect tolls sufficient to pay the cost of maintain-

ing, repairing and operating the turnpike as well as the face of the bonds, the interest thereon, and all reserve and sinking fund requirements, and

(c) the tolls shall be applied first to pay the cost of maintaining, repairing and operating the turnpike and to provide any required reserves for those purposes and thereafter to pay the principal and interest on the bonds and any fiscal charges or premiums in connection therewith.

Section 15, 36 P. S. § 652(o) provides that when all bonds and interest thereon have been paid or provided for, "the turnpike and the connecting tunnels and bridges shall become a part of the system of state highways and shall be maintained by the Department of Highways free of tolls . . ."

The second statute involved is the Pennsylvania Gross Receipts Tax Act of June 22, 1931, P. L. 694, as amended, 72 Purdon's Pennsylvania Statutes Annotated §§ 2183, 2184, 2185, which is printed as part of the Addendum to this Petition at pages 20-21, and which provides in pertinent part as follows:

The title of the Act states that it imposes a tax on gross receipts "as an excise on the use of the public highways" by motor vehicles transporting passengers and property for hire.

Section 1, 72 P. S. § 2183, defines the terms used in the statute.

Section 2, 72 P. S. § 2184, provides that companies subject to the excise tax shall submit a report of all relevant facts including their gross receipts for the taxable period.

Section 3, 72 P. S. § 2185, specifies that an interstate motor carrier [such as petitioner] shall pay a tax of eight (8) mills upon the dollar upon such portion of its gross receipts as is represented by the ratio that the number of miles of routes operated in Pennsylvania by the carrier during the taxable year bears to the total number of miles of all routes operated by the carrier during that year.

Question Presented.

A novel question in a familiar field of constitutional law springs from the following facts of this case:

The Pennsylvania Turnpike is a self-supporting toll road constructed by the Pennsylvania Turnpike Commission created by a statute passed in 1937 especially for that purpose. That statute authorized the Turnpike Commission to construct, operate and maintain the turnpike and to pay all costs of planning, financing, constructing, operating and maintaining it, out of tolls collected from those who use the turnpike.

The turnpike statute requires the Commission to fix and revise those tolls so that they will produce sufficient funds to reimburse the Commonwealth for all costs incurred in connection with the planning, financing, construction, operation and maintenance of the turnpike; to establish and maintain all necessary reserves and sinking funds; and to pay off the bonds issued by the Turnpike Commission, and the interest thereon.

Petitioner is a Delaware corporation whose sole activity in Pennsylvania is the interstate transportation of property by motor vehicle for hire, as a common carrier, pursuant to certificates of public convenience and necessity issued by the Interstate Commerce Commission. Petitioner operates over routes traversing several states, including Pennsylvania, part of its routes in Pennsylvania being over the Pennsylvania Turnpike (12a).

During the year involved in this test case, petitioner used the Turnpike and paid in full the tolls of $109,324.88 assessed by the state as the amount due to the state for such use (13a).

Under the Pennsylvania Gross Receipts Tax Act petitioner also paid the state a gross receipts tax of $13,547.68 as compensation for its use of the state's highways other than the turnpike (13a). However, the state insisted that petitioner pay an additional tax of $13,834.15 under

that statute allegedly as "compensation" for the same use of the turnpike (13a) for which petitioner had already paid the state-assessed tolls of $109,324.88.

Petitioner declined to pay this additional tax on the ground that the state had already been fully compensated for petitioner's use of the turnpike through receipt of tolls which, by the terms of the Turnpike Act, are required to fully compensate the state for all costs of constructing, operating and maintaining the turnpike. Petitioner contended that, under the Commerce Clause, the state could collect full compensation for use of the turnpike only once and that, having collected full compensation through its self-assessed tolls for use of this self-supporting toll-road, the state could not collect any excise tax on petitioner's turnpike mileage and revenue because the tolls paid by petitioner represented petitioner's "fair share" of all turnpike costs as fixed by the state itself.

The state administrative agencies and courts declined to recognize the validity of petitioner's claim that the Commerce Clause denied to the state any right to collect this excise tax as "compensation" for this same use of the turnpike because, in fact, the state would *not* be giving petitioner the right to such use—or indeed anything—in return for such tax.

Petitioner therefore brings to this Court the following question:

Whether, consistently with the Commerce Clause, an exclusively interstate motor carrier which has already paid to the state, for use of a toll-road, the tolls fixed by the state pursuant to a statute requiring the tolls to be fully compensatory, can—in addition to those tolls—be required to pay, as additional compensation for that same use of the toll-road, an excise tax which, standing alone, would have no basis for constitutional validity except as compensation for the carrier's same use of the same toll-road.

Statement.

This litigation resulted from the refusal of petitioner, which operates exclusively in Pennsylvania as an interstate motor carrier, to pay a excise tax for the use of the Pennsylvania Turnpike, because advised by counsel that the state-assessed tolls which petitioner had already paid for use of that self-supporting toll-road represent the maximum compensation which petitioner can constitutionally be forced to pay to the state for such use.

This test case was begun by the filing in the trial court of petitioner's Appeal (3a) from the action of the State Board of Finance and Revenue in refusing to set aside a "settlement" of petitioner's Gross Receipts Tax return for 1951 theretofore made by the state taxing authorities. The case was tried before a Judge without a jury and upon a Stipulation of Fact. On appeal, that stipulation was, in relevant part, incorporated in an agreed Statement (7a) submitted by the parties to the Supreme Court of Pennsylvania.

The Stipulation and Statement disclose the parties' agreement on the following facts:

(1) During the year involved, petitioner did not engage in any activity or own or employ any capital or property in Pennsylvania except that which was necessary and required in furtherance of its exclusively interstate business in that state.

(2) During the year involved, petitioner paid to the state and its political sub-divisions all taxes due on real estate, liquid fuels, gasoline, and other property and transactions taxed by either the state or its political sub-divisions, except (a) that part of the Gross Receipts Tax involved in this litigation and (b) another state tax, the constitutionality of which was then (and is now) under review by the State Supreme Court.

(3) For the year involved, petitioner paid (a) all tolls charged by the state for use of the toll-road involved in this suit and (b) all gross receipts taxes claimed by the state as compensation for petitioner's use of all state highways other than this toll-road.

For the year involved in this test case, petitioner therefore paid (1) an excise tax of $13,547.68 for its use of Pennsylvania's highways other than the turnpike, and (2) tolls of $109,324.88 for its use of the turnpike. These tolls were, as stated above, the full charge fixed and demanded by the state for petitioner's use of the turnpike during that year. Petitioner declined to pay an additional excise tax of $13,834.15 also claimed by the state as compensation for petitioner's same use of the turnpike on the ground that the state had already been fully compensated for such use by collection of the $109,324.88 in tolls.

Under the Pennsylvania Turnpike Act, the turnpike is required to be and is a fully self-supporting toll-road. Consequently, petitioner contended that, having collected these fully compensatory tolls for petitioner's use of the toll-road, the state could not possibly have any right to then collect an excise tax as "compensation" for such use, which use was the only basis for the state's claim for the additional $13,834.15.

Petitioner believed that the soundness of its contention was emphasized by the fact that the State Supreme Court, in its prior decisions upholding the validity of the gross receipts tax as an excise levied on exclusively interstate carriers, based that decision solely on the right of the state to exact "compensation-for-use" from such carriers. *Shirks Motor Express Corporation v. Messner*, 375 Pa. 450.

Petitioner urged the state's administrative agencies and courts that, consistently with the Commerce Clause, the greatest sum which the state could constitutionally exact from petitioner as compensation for use of the turnpike would be the tolls assessed by the state itself and paid by petitioner. This position was based on the fact

that the Turnpike Act requires that the tolls be fixed and revised so that they are adequate to pay the entire cost of building, operating, maintaining and repairing the turnpike as well as the face of the bonds, the interest thereon, all reserve and sinking fund requirements, and all other expenses of the turnpike. Since the tolls put the State in funds to pay all of these items, collection of the tolls necessarily exhausts the state's power as against an exclusively interstate motor carrier which can be forced to contribute only its fair share of the cost to the state of building, operating and maintaining the state's highways.

To petitioner this seemed and still seems to be an elementary proposition. In support of this position, petitioner specifically invited the attention of the state's administrative agencies and courts to the decisions of this Court which appear in the margin.[1]

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1. *Sprout v. South Bend*, 277 U. S. 163, where this Court said (at page 170):

> ". . . a state may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways."

Interstate Transit v. Lindsey, 283 U. S. 183, where this Court said (at page 189):

> ". . . a state may demand of one carrying on an interstate bus business only fair compensation for what it gives. . . ." and that such a charge is "valid only if compensatory."

Ingels v. Morf, 300 U. S. 290, where this Court said (at page 294):

> "To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power."

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495, 503, 504, where this Court said:

> "It is far too late to question that a state consistently with the commerce clause, may lay upon motor vehicles engaged exclusively to interstate commerce, or upon those who own and so

Despite those decisions of this Court and its own prior concurrence with them, the Supreme Court of Pennsylvania dismissed petitioner's constitutional defense to this tax by merely adopting as its own the opinion of the trial court (12a). That court had dismissed petitioner's federal constitutional contentions by holding that "this precise question has been disposed of in *Interstate Motor Freight System, Inc. v. Messner et al.*, 63 Dauph. 405 (1953); *Shirks Motor Express Corporation v. Messner*, 375 Pa. 450 (1953), appeal dismissed for want of a substantial Federal question at 347 U. S. 941, re-hearing denied 347 U. S. 970."

Of the parties involved in that case, only *Interstate Motor Freight System, Inc.* was an exclusively interstate carrier. *Interstate's* contentions concerning turnpike use had been dismissed by the Supreme Court of Pennsylvania in the following cryptic language:

> "Appellant Interstate has not shown that the tax plus the toll exceeds fair compensation for its use of the Turnpike. A taxpayer cannot voluntarily assume a burden and then be heard to say that it is unconstitutional." 375 Pa. 461.

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operate them, a fair and reasonable, nondiscriminatory tax as compensation for the use of its highways." 332 U. S. 583.

"Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways." 332 U. S. 504.

Capitol Greyhound Lines v. Brice, 339 U. S. 542, where this Court said (at 544) that such taxes have been invalidated where "... the amount of the tax exceeded fair compensation to the state ..." and (at 547) that in such a case "... such carriers may ... obtain a judicial declaration of their invalidity as applied," citing *Ingels v. Morf*, 300 U. S. 290.

Indeed, the Supreme Court of Pennsylvania itself had previously summarized these decisions of this Court in *Shirks Motor Express Corp. v. Messner*, 375 Pa. 450, 456, as follows:

> "... it must affirmatively appear that it [the tax] is levied only as compensation for use of its highways," and "... the tax must be for the purpose of compensating the state for the use of its highways."

Petitioner pointed out to the Supreme Court of Pennsylvania that in this case it does not purport to question the *amount* of the excise tax, but, rather, asserts the state's complete *lack of power* to exact a tax *of any amount* for petitioner's use of the turnpike after the state has already stipulated and received an amount which by its own statute is required to totally compensate the state for all costs in connection with the construction, maintenance and operation of the turnpike. Petitioner contended that it did not have to undertake the burden of *proving* that the total of the tax plus the toll is unreasonable because the *full* compensation already paid to the state certainly represents the maximum "reasonable" compensation which the state could claim from petitioner as petitioner's "fair share" of turnpike costs, and the claim for the additional $13,834.15 had no other basis whatsoever.

Petitioner emphasized that, in this respect, this case is significantly and indeed fundamentally different from prior cases in this field because in this case the state has by its own statute stipulated the amount required to fully compensate it for all its costs and provided for recovery of the entire amount, plus all necessary reserves, by collection of tolls from users of the highway involved. In the usual case, the statute involved does not purport to either fix or approximate that amount and the carrier challenging the tax has the burden of proving that the tax either has no relation to use or is unreasonable in amount. In such cases, the question whether the carrier's "fair share" has been paid is impossible of exact determination because the state has not stipulated any figure and the carrier can rarely fix one with any degree of exactitude. *See Capital Greyhound Lines v. Brice*, 339 U. S. 542, 546, 547.

But in this case the state demanded and petitioner paid exactly $109,324.88 as compensation for use of the turnpike in the year involved. Having received that amount "fixed by itself as being wholly compensatory" the state cannot now make it "affirmatively appear that [the additional tax]

is levied only as compensation for the use of its highways". This statement of the limitation of the state's power appears in the opinion of the Supreme Court of Pennsylvania in *Shirks Motor Express Corp. v. Maessner*, 375 Pa. 450, 456 which the trial court held to be decisive of this case.

The prior two-sentence quotation from that opinion demonstrates, however, that the Supreme Court of Pennsylvania did not really meet and consider in that case this "total lack of power" issue here relied upon by petitioner. Nevertheless, in this case, that court affirmed *per curiam* an order of the trial court which held that prior decision to be controlling on this issue.

Petitioner has therefore been stripped of the protection of the Commerce Clause without any informed and deliberate opinion on this crucial point by either court below. It has been held liable to "compensate" the state by paying $13,000 for which it receives absolutely nothing from the state in return. This attempted exaction of tribute from an exclusively interstate carrier, over and above its "fair share" and without any *quid pro quo* from the state, is the issue petitioner brings to this Court.

Reasons for Granting the Writ.

This case presents a novel and important aspect of a constitutional question which has always received the close scrutiny of this court. The numerous opinions listed in the margin[2] have established the principle that interstate

2. *Hendrick v. Maryland*, 235 U. S. 610 (1915); *Kane v. New Jersey*, 242 U. S. 160 (1916); *Clark v. Poor*, 274 U. S. 554 (1927); *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245 (1928); *Spector v. South Bend*, 277 U. S. 163 (1928); *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183 (1931); *Continental Banking Co. v. Woodward*, 286 U. S. 352 (1932); *Hicklin v. Cooney*, 290 U. S. 169 (1933); *Aero Mayflower Transit Co. v. Georgia Public Service Com.*, 295 U. S. 285 (1935); *Morf v. Bingaman*, 298 U. S. 407 (1936); *Duckworth v. Morf*, 300 U. S. 290 (1937); *Dixie Ohio Express Co. v. State Revenue Com.*, 306 U. S. 72 (1939); *Clark v. Paul Gray, Inc.*, 306

motor carriers cannot be charged more than their fair share of the cost and the maintenance of facilities furnished by the states. Over the years, this Court has consistently agreed to review state court decisions on this issue in order to safeguard this basic protection to which such carriers are entitled under the Commerce Clause.

That protection is threatened by the decision below because, as is more fully set forth in the Statement, appearing at pages 7-12 of this petition, that decision holds that, even though the state itself has established the maximum amount of compensation due to it for use of the self-supporting toll-road involved in this case, it can nevertheless force an exclusively interstate carrier to make further payments for the same use. The result is that, despite the limitations of the Commerce Clause heretofore spelled out by this Court, interstate motor carriers can be made to first pay tolls which—under the state's own statute—must be fully compensatory, and then, in addition, pay tribute in the form of an excise tax allegedly assessed as "compensation" for the same use of the same toll-road and for nothing else.

This ruling flies in the face of the principles established by this Court in the cases cited above and especially cases such as *Ingels v. Morf*, 300 U. S. 290, the vitality of which decision was re-affirmed in *Capitol Greyhound Lines v. Brice*, 339 U. S. 542. Moreover, if motor carriers can be charged full compensation (in this case $109,000) plus a "compensatory" excise tax (in this case $13,000) for use of this particular state-furnished facility, there is no reason why all other interstate businesses cannot be subjected to virtually unlimited charges for use of state-furnished facilities and the "fair share" rule ignored. The subjection of interstate motor traffic to such charges is only

U. S. 583 (1939); *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U. S. 176 (1940); *Aero Mayflower Transit Co. v. Board of Railroad Comrs.*, 332 U. S. 495 (1947); *Capitol Greyhound Lines v. Brice*, 339 U. S. 542 (1950).

one example of the exercise of such state power. See *Clyde Mallory Lines v. Alabama*, 296 U. S. 261, 267, 268 (1935) and cases there cited.

Thus the decision below is one of general importance in a field in which this Court has regularly reviewed state court actions and zealously guarded the rights of individuals and businesses under the Commerce Clause. This has been so at least since *Steamship Co. v. Port Wardens*, 6 Wall. 31 (U. S. 1867). Certainly if the $5.00 fee there proscribed was invalid because of the lack of a *quid pro quo*, this excise tax, amounting to thousands of dollars, and for which the carrier likewise receives nothing, must also fall. See also *Foote & Co. v. Stanley*, 232 U. S. 494 (1914); *Postal Telegraph Cable Co. v. Taylor*, 192 U. S. 64 (1904); *Mackay Tel. & Cable Co. v. Little Rock*, 250 U. S. 94 (1919).

The whole point of this petition is that the Supreme Court of Pennsylvania has in effect ruled that, after paying its fair share through fully compensatory tolls for the use of a state owned toll-road, an interstate carrier can be forced to pay an additional tribute for which it receives absolutely nothing from the state. If Pennsylvania can so treat interstate commerce, so can forty-nine other states, and the protection which the Commerce Clause was intended to provide for interstate commerce will become a myth.

Finally, this is a serious and important constitutional issue as to which not only motor carriers but all other interstate businesses are entitled to a definitive decision and opinion of this Court. Contrary to the assertion of the trial court in this case—which respondent will no doubt repeat in this Court—this particular basis for the invalidity of the charge here challenged was *not* passed upon by the Supreme Court of Pennsylvania in the *Shirks* and *Interstate* cases, 375 Pa. 450, 461 and it was thus *not* passed upon by this Court on the appeal which was sum-

marily dismissed at 347 U. S. 211.[3] And, in any event, if such a practice is now to be made lawful, the powers of the states, and the federal constitutional limitations thereon, should be spelled out specifically by this Court after full deliberation and not permitted to rest on a cryptic opinion of a state trial court, without any discussion or treatment of either the basic issue involved or the controlling decisions of this Court.

Conclusion.

Certiorari should be granted and the judgment reversed.

Respectfully submitted,

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3. Under familiar principles, the denial of certiorari in the companion case of *Spector Motor Service, Inc. v. Messner*, 347 U. S. 967 (1954), did not reflect any view on the merits of this issue.

ADDENDUM.

Statutes Involved.

The Pennsylvania Turnpike Act of May 21, 1937, P. L. 774, as amended, 36 P. S. § 652a et seq., provides in pertinent part as follows:

Section 1, 36 P. S. § 652a provides:

"In order to facilitate vehicular traffic between the eastern and western sections of the Commonwealth, the Pennsylvania Turnpike Commission hereinafter created is hereby authorized and empowered to construct, operate and maintain a turnpike at such location as shall be approved by the Department of Highways, from a point at or near Middlesex in Cumberland County to a point at or near Irwin in Westmoreland County, together with connecting tunnels and bridges, and to issue turnpike revenue bonds of the Commonwealth, payable solely from tolls, to pay the cost of such construction."

Section 3(d), 36 P. S. § 652c(d), defines the term "cost of the turnpike" as follows:

"The term 'cost of the turnpike' shall embrace the cost of constructing the turnpike and all connecting tunnels and bridges; the cost of all lands, properties, rights, easements and franchises acquired which are deemed necessary for such construction; the cost of all machinery and equipment, financing charges, interest prior to and during construction and for one year after completion of construction; cost of traffic estimates and of engineering and legal expenses; plans, specifications, surveys, estimates of cost and of revenues; other expenses necessary or incident to determining the feasibility or practicability of the enterprise; administrative expense; and such other expenses as may be neces-

sary or incident to the financing herein authorized; the construction of the turnpike and connecting tunnels and bridges; the placing of the same in operation; and the condemnation of property necessary for such construction and operation. Any obligation or expense heretofore or hereafter incurred by the Department of Highways of the Commonwealth for traffic surveys, preparation of plans and specifications, supervision of construction and other engineering services performed by the department and its agents and employes in connection with the construction of the turnpike or any of the connecting tunnels and bridges, shall be regarded as a part of the cost of the turnpike and shall be reimbursed to the Department of Highways out of the proceeds of the turnpike revenue bonds hereinafter authorized."

Section 8, 36 P. S. § 652h, provides for payment of the "cost of the turnpike" from the proceeds of the sale of revenue bonds and for retirement of the bonds from the fund created by collection of tolls under the Act:

"The Commission is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of turnpike revenue bonds of the Commonwealth for the purpose of paying the cost as hereinabove defined of the turnpike, which resolution shall recite an estimate of such cost. The principal and interest of such bonds shall be payable solely from the special fund herein provided for such payment. . . ."

Section 9, 36 P. S. § 652i, provides:

"All moneys received from any bonds issued pursuant to this act shall be applied solely to the payment of the cost of the turnpike or to the appurtenant funds. . . ."

Section 12, 36 P. S. § 652(l) provides in pertinent part as follows:

"The turnpike when completed and opened to traffic shall be maintained and repaired by and under the control of the commission through the Department of Highways of the Commonwealth, and all charges and costs for such maintenance and repairs actually expended by said Department of Highways shall be paid to it by the commission upon certification thereof, out of tolls . . . ."

"The commission is hereby authorized to fix and revise, from time to time tolls for the use of the turnpike and the different parts or sections thereof, and to charge and collect the same . . . . Such tolls shall be so fixed and adjusted as to provide a fund at least sufficient with other revenues of the turnpike, if any, to pay—(a) the cost of maintaining, repairing and operating the turnpike; and (b) the bonds and the interest thereon, and all sinking fund requirements, and other requirements . . . as the same shall become due . . . . The tolls . . . except such part thereof as may be required to pay the cost of maintaining, repairing and operating the turnpike and to provide such reserves therefor as may be provided for in the resolution authorizing the issuance of the bonds or in the trust indenture, shall be set aside at such regular intervals as may be provided in such resolution or such trust indenture, in a sinking fund which is hereby pledged to, and charged with the payment of, (1) the interest upon such bonds as such interest shall fall due . . . (3) the necessary fiscal agency charges for paying principal and interest; and (4) any premium upon bonds retired by call or purchase as herein provided . . . ."

Section 15, 36 P. S. § 652(o) provides as follows:

"When all bonds and the interest thereon shall have been paid or a sufficient amount for the payment of all bonds and the interest to maturity thereon, shall have been set aside in trust for the benefit of the bondholders, and shall continue to be held for that purpose, the turnpike and the connecting tunnels and bridges shall become a part of the

system of State highways, and shall be maintained by the Department of Highways free of tolls, and thereupon the commission shall be dissolved, and all funds of the commission not required for the payment of the bonds and all machinery, equipment and other property belonging to the commission, shall be vested in the Department of Highways."

Pennsylvania Gross Receipts Tax Act

The Act of June 22, 1931, P. L. 694, as amended, 72 Purdon's Pennsylvania Statutes Annotated §§ 2183, 2184, 2185, provides as follows:

"An Act imposing a tax on gross receipts as an excise on the use of the public highways by certain owners or operators of motor vehicles transporting passengers and property for hire.

"Section 1. The word 'company,' as used in this act, shall be construed to mean any individual who, or copartnership, corporation, joint-stock association, or association of individuals whatsoever which, shall engage in the business of carrying passengers or property for hire over the highways of this Commonwealth in motor vehicles or trackless trolleys. For the purposes of this act, the term 'motor vehicle' shall be construed to mean every vehicle which is self-propelled, except such as move upon or are guided by a track erected upon the highways.

"Section 2. Each company shall pay an excise tax for the use of the highways of this Commonwealth. For the purpose of ascertaining the amount to be paid, each such company shall, on or before the first day of February, of each year, file with the Department of Revenue, on forms prescribed and furnished by it, a report, under oath or affirmation, setting forth: (1) The name and address of the company owning or operating such motor vehicles; (2) the location of the principal place of business of such company; (3) the name and address of the person in this Com-

monwealth upon whom service of process or other notice may be had against such company; (4) a schedule, if any, or if not, a description of the routes over which such company shall have operated over highways in this Commonwealth during the period for which the report is filed; (5) the number of miles of all routes over which such motor vehicle or motor vehicles shall have been operated by such company during the period for which the report is filed; (6) the number of miles within this Commonwealth of all such routes so operated during the period for which the report is filed; and (7) the amount of gross receipts of such company from all sources upon its operations during the period for which the report is filed, and such other relevant information as the Department of Revenue may require in connection with the settlement of the excise tax hereinafter provided, for the calendar year immediately preceding the first day of January of each year.

"Section 3. The amount of excise tax annually to be paid by each company specified in section one of this act shall be as follows: (1) In case of a company operating routes which are entirely within the limits of this Commonwealth, eight (8) mills upon the dollar upon the gross receipts of such company from all operations for the period covered by such report; and (2) in case of a company operating over routes when only a part of such routes lies within this Commonwealth, eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed, bears to the total number of miles of all routes operated by such company during said period. The provisions hereof shall not be construed as exempting any company from complying with the laws relating to fees payable to the Department of Revenue for the registration of motor vehicles."

Appendix.

DOCKET ENTRIES IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT.

COMMONWEALTH OF PENNSYLVANIA

v.

TRANSAMERICAN FREIGHT LINE, INC.
Appellant.

No. 18 May Term, 1959.

Oct. 14, 1958. Appeal and affidavit filed.

Oct. 14, 1958. Certiorari exit, returnable the fourth Monday of May, 1959.

Oct. 21, 1958. Appearance for appellee, filed.

Oct. 28, 1958. Petition of appellant to advance argument, with joinder of appellee, filed.

ORDER.

October 30, 1958, argument of the above entitled appeal is advanced to the January, 1959 Session in Philadelphia.

By the Court,

Jones, Chief Justice.

Oct. 31, 1958. Certified to Philadelphia.

Dec. 9, 1958. Petition of appellant for continuance filed.

Dec. 10, 1958. Joinder of appellee to petition for continuance, filed.

ORDER.

December 10, 1958, argument continued to the April, 1959 Session in Philadelphia.

By the Court,

Jones, Chief Justice

Mar. 12, 1959. Statement under Rule 41 filed.

Mar. 30, 1959. Record filed.

Apr. 21, 1959. Argued.

DECISION.

May 28, 1959. Order affirmed. Per Curiam.

June 8, 1959. Record remitted to court below.

July 25, 1959. Notice of appellant of intention to file petition for certiorari to the Supreme Court of the United States, and praecipe for certification of the record, filed.

July 27, 1959. Supplemental certiorari exit, returnable forthwith.

Aug. 4, 1959. Record filed.

Aug. 7, 1959. Record certified to the Supreme Court of the United States.

Attorneys for Appellant: La Brum and Doak; James M. Marsh.

Attorneys for Appellee: Edward Friedman, Deputy Attorney General, Anne X. Alpern, Attorney General.

APPEAL AND SPECIFICATION OF OBJECTIONS.

To the Honorable, the Judges of the Said Court:

Transamerican Freight Lines, Inc. hereby appeals from the Settlement of Gross Receipts Tax made against it for the calendar year 1951, and from the decision of the Board of Finance and Revenue on its Petition for Review, and in support of its appeal avers:

1. Transamerican Freight Lines, Inc. (hereafter called "defendant"), is a Delaware corporation with its principal office at 1700 North Waterman Street, Detroit 9, Michigan.

2. Defendant is engaged exclusively in interstate commerce in the business of transporting property by motor vehicle for hire, as a common carrier, pursuant to and by virtue of certain certificates of public convenience and necessity issued by the Interstate Commerce Commission.

3. Defendant operates over routes traversing several states, including Pennsylvania, part of said routes in Pennsylvania being over the Pennsylvania Turnpike.

4. During the year 1951, defendant owned two freight terminals within the Commonwealth of Pennsylvania, and also owned certain personal property, including motor vehicles, used in the pickup and delivery of freight moving in interstate commerce in Pennsylvania.

5. During the year 1951, defendant was engaged exclusively in interstate commerce in Pennsylvania; and did not engage in any activity or own or employ any capital or property in said state except that which was necessary and required in the furtherance of its exclusively interstate business in said state.

6. During the year 1951, vehicles owned by defendant travelled 2,933,336 miles over state highways in Pennsylvania (exclusive of the Pennsylvania Turnpike), and defendant paid the Department of Revenue the sum of $13,547.68, representing the tax on the gross receipts pro-

duced by such mileage, computed in accordance with the Act of June 22, 1931, P. L. 694, as amended.

7. During the year 1951, defendant paid to the Pennsylvania Turnpike Commission tolls amounting to $109,324.88, representing the full charge levied by the said Commission for 2,833,054 miles of use of the Pennsylvania Turnpike during that year.

8. Defendant has therefore paid to the Commonwealth both the total gross receipts tax ($13,547.68) claimed by the Commonwealth for all of defendant's use of the Commonwealth's highways other than the Turnpike in 1951, and all tolls ($109,324.88) levied by the Turnpike Commission for defendant's use of the Turnpike during that year.

9. Under the terms of a "settlement" issued by the Department of Revenue under date of September 8, 1955, the Department demanded that defendant pay an additional tax of $13,834.15, allegedly computed under the said Act of June 22, 1931, as amended, and representing the tax alleged to be due because of the gross receipts produced by the 2,883,054 miles travelled on the Pennsylvania Turnpike by defendant's vehicles during the year 1951.

10. On December 5, 1955, defendant filed with the Department of Revenue a Petition for Resettlement of the said gross receipts tax, copy of which is attached hereto and marked "Exhibit A", in which defendant denied all liability for the said $13,834.45 claimed by the Department of Revenue on the ground that application of such tax to mileage travelled over the Pennsylvania Turnpike was forbidden by the Commerce Clause of the Constitution of the United States because defendant had already fully compensated the Commonwealth and its agent, the Turnpike Commission, for the use of the Turnpike, by payment of tolls fixed by the said Commission and required by statute to be at least equal to defendant's full share of the cost of construction, operation and maintenance of the said Turnpike.

11. By a notice mailed to defendant on February 7, 1957, the Secretary of Revenue and the Auditor General of the Commonwealth denied defendant's said Petition for Resettlement.

12. On April 4, 1957, defendant filed with the Board of Finance and Revenue a Petition for Review of Denial of Petition for Resettlement, a copy of which is attached hereto and marked "Exhibit B," renewing therein the same Federal constitutional grounds set forth in defendant's Petition for Resettlement which is "Exhibit A" hereto.

13. By a notice mailed to defendant on August 8, 1957, the Board of Finance and Revenue refused defendant's said Petition for Review and sustained the action theretofore taken by the Secretary of Revenue and the Auditor General.

14. Defendant, being aggrieved by the decision of the Board of Finance and Revenue, hereby appeals from the said decision in accordance with the provisions of Section 1104 of the Fiscal Code of April 9, 1929, as amended, 72 P. S. § 1104, and in further support of its appeal defendant files herewith the following:

SPECIFICATION OF OBJECTIONS

1. Since defendant, engaged exclusively in interstate commerce, can constitutionally be subjected to this gross receipts tax only to the extent necessary to compensate the Commonwealth for defendant's use of the highways, and since defendant has already paid such compensation in full in the amounts fixed by the Commonwealth and its agents, namely $13,547.68 for use of the highways and $109,324.88 for use of the Turnpike, the Commonwealth's attempt to force defendant to pay an additional tax of $13,834.15 for the calendar year 1951 for use of the Turnpike for which defendant has already paid in full the compensation therefor fixed under the Act of May 21, 1937, P. L. 774, 36 P. S. § 652 et seq.; the Act of May 16, 1940 (Extra Session) P. L. (1941) 949, 36 P. S. § 653 et seq.; the Act of June 11, 1941,

P. L. 101, 36 P. S. § 654 et seq.; the Act of May 23, 1951, P. L. 335, 36 P. S. (pocket part) § 658.1 et seq.; the Act of September 27, 1951, P. L. 1430, 36 P. S. (pocket part) § 660.1 et seq.; the Act of June 10, 1955, P. L. 157, 36 P. S. (pocket part) § 666.1 et seq.; the Act of January 14, 1952, P. L. (1952) 1947, 36 P. S. (pocket part) § 667.1 et seq.; the Act of July 28, 1953, P. L. 706, 36 P. S. (pocket part) § 668.1 et seq.; and the Act of June 14, 1955, P. L. 174, 36 P. S. (pocket part) § 669.1 et seq., is forbidden by the Commerce Clause of the Constitution of the United States and is therefore arbitrary, illegal and void.

2. On all the facts and principles as stated, the decision of the Board of Finance and Revenue here appealed from violates the Commerce Clause of the Constitution of the United States.

3. Defendant cannot constitutionally be subjected to the claimed additional tax and a resettlement of no liability should be ordered.

4. The Board of Finance and Revenue erred in its denial of defendant's Petition for Review and in sustaining the erroneous and unlawful action of the Secretary of Revenue and the Auditor General in issuing the settlement claiming an additional amount of tax from defendant.

5. The Board of Finance and Revenue erred in refusing to direct that defendant's liability for gross receipts tax be resettled to show no tax due.

6. The Act of June 22, 1931, P. L. 694, as amended, is unconstitutional as sought to be applied to defendant's Turnpike mileage and revenue by the Department of Revenue, the Auditor General, and the Board of Finance and Revenue, as aforesaid.

TRANSAMERICAN FREIGHT LINES, INC.

By R. B. GOTFREDSON,

President

(Attest, Affidavit and Exhibits omitted in printing.)

STATEMENT UNDER RULE 41 OF THE SUPREME COURT OF PENNSYLVANIA.

The parties to this appeal hereby file this statement of the case pursuant to Rule 41 of this Court:

The question for decision in this case arose under an Appeal and Specification of Objections filed in the Dauphin County Court at No. 372 Commonwealth Docket 1957 by Transamerican Freight Lines, Inc., Appellant herein, hereinafter called "Transamerican." Said Appeal and Specification of Objections complained of the refusal by the Board of Finance and Revenue of Transamerican's Petition for Review, thereby sustaining the action theretofore taken by the Secretary of Revenue and the Auditor General holding Transamerican liable for Gross Receipts Tax for the use of the Pennsylvania Turnpike by its trucks for the year 1951.

Pursuant to stipulations approved by the Court below, the case was tried before Judge Neely without a jury and upon a Stipulation of Fact entered into between the parties. Said Stipulation of Fact is, in relevant part, as follows:

1. Transamerican Freight Lines, Inc. (hereafter called "defendant") is a Delaware Corporation with its principal office at 1700 North Waterman Street, Detroit 9, Michigan.

2. Defendant operates over routes traversing several states, including Pennsylvania, part of said routes in Pennsylvania being over the Pennsylvania Turnpike.

3. Defendant is engaged in Pennsylvania exclusively in interstate commerce in the business of transporting property by motor vehicle for hire, as a common carrier, pursuant to and by virtue of certain certificates of public convenience and necessity issued by the Interstate Commerce Commission.

4. During the year 1951, defendant owned two freight terminals within the Commonwealth of Pennsylvania, and also owned certain personal property, including motor vehicles, used in the pick-up and delivery of freight moving in interstate commerce in Pennsylvania.

5. During the year 1951, defendant was engaged exclusively in interstate commerce in Pennsylvania, and did not engage in any activity or own or employ any capital or property in said state except that which was necessary and required in the furtherance of its exclusively interstate business in said state.

6. During the year 1951, defendant brought into Pennsylvania and delivered in this state certain shipments of property which originated outside of Pennsylvania; during the said year defendant also picked up in Pennsylvania and delivered to destination outside of Pennsylvania certain shipments of property; but during the said year defendant did not deliver in Pennsylvania any shipments of property which also originated in Pennsylvania.

7. Defendant has neither applied for nor received any certificates of public convenience and necessity from the Pennsylvania Public Utilities Commission and during the year 1951 all of defendant's business in Pennsylvania was conducted pursuant to and by virtue of certain certificates of public convenience and necessity issued by the Federal Interstate Commerce Commission.

8. During the year 1951, defendant paid to the Commonwealth and its political sub-divisions all taxes due on real estate, liquid fuel, gasoline, and other property and transactions taxed by either the Commonwealth or its political sub-divisions. Because of the exclusively interstate nature of its business, defendant is not liable to the Commonwealth for the Franchise Tax, the Foreign Bonus or Excise Tax, or the Corporate Net Income Tax. Because of the exclusively interstate nature of defendant's business in Pennsylvania, defendant has, on advice of counsel,

made no payment on account of the Corporation Income Tax and has deferred its ultimate decision with respect to that tax until the Supreme Court of Pennsylvania has reviewed this court's decision in the *Riss* and *Eastern Motor Express* cases and now on appeal to that court.

9. During the year 1951, vehicles owned by defendant travelled 2,933,336 miles over state highways in Pennsylvania other than the Pennsylvania Turnpike.

10. In accordance with the Act of June 22, 1931, P. L. 694, as amended, defendant filed a Gross Receipts Tax return for 1951 and paid the Department of Revenue the sum of $13,547.68, representing the tax on the gross receipts produced by the mileage traveled over all Pennsylvania State Highways other than the Turnpike, computed in accordance with the said Act.

11. During the year 1951, defendant paid to the Pennsylvania Turnpike Commission tolls amounting to $109,324.88, representing the full charge made by the said Commission for 2,883,054 miles of use of the Pennsylvania Turnpike during that year.

12. Defendant has therefore paid to the Commonwealth both the total gross receipts tax ($13,547.68) claimed by the Commonwealth for all of defendant's use of the Commonwealth's highways other than the Turnpike in 1951, and all tolls ($109,324.88) charged by the Turnpike Commission for defendant's use of the Turnpike during that year.

13. Under the terms of a "settlement" issued by the Department of Revenue under date of September 8, 1955, a copy of which is attached hereto and marked "Exhibit A", the Department demanded that defendant pay an additional tax of $13,834.15, allegedly computed under the said Act of June 22, 1931, as amended, and representing the tax alleged to be due because of the gross receipts produced by the 2,883,054 miles traveled on the Pennsyl-

vania Turnpike by defendant's vehicles during the year 1951. (No exhibits are reproduced in statement under Rule 41.)

14. On December 5, 1955, defendant filed with the Department of Revenue a Petition for Resettlement of the said 1951 gross receipts tax, a copy of which is attached hereto and marked "Exhibit B".

15. By notice mailed to defendant on February 7, 1957, a copy of which is attached hereto and marked "Exhibit C", the Secretary of Revenue and the Auditor General of the Commonwealth denied defendant's said Petition for Resettlement of defendant's Gross Receipts Tax for the year 1951.

16. On April 4, 1957, defendant filed with the Board of Finance and Revenue Petition for Review of Denial of its Petition for Resettlement of Gross Receipts Tax for the year 1951, a copy of which is attached hereto and marked "Exhibit D".

17. By notice mailed to defendant on August 8, 1957, a copy of which is attached hereto and marked "Exhibit E" the Board of Finance and Revenue refused defendant's said Petition for Review and sustained the action theretofore taken by the Secretary of Revenue and the Auditor General in denying defendant's Petition for Resettlement of Gross Receipts Tax for the year 1951.

18. On October 3, 1957, defendant filed in this Court its Appeal and Specification of Objections from the decision of the Board of Finance and Revenue on its Petition for Review.

After argument and submission of briefs, the Dauphin County Court, in an opinion by Hon. William H. Neely dated July 21, 1958, dismissed Transamerican's appeal. Transamerican filed Exceptions and, by stipulation of counsel, argument thereon was waived.

On September 18, 1958, the Court below entered its final Order, from which this appeal was taken within the time provided by statute.

Transamerican's Appeal and Specification of Objections, and its Exceptions to the Opinion and Order of the Court below, are to be included as part of the record on appeal.

JAMES M. MARSH,
J. HARRY LABRUM,
LABRUM AND DOAK,
1507 Packard Building,
Philadelphia 2, Pennsylvania,
Counsel for Appellant.

EDWARD FRIEDMAN,
Deputy Attorney General,
ANNE X. ALPERN,
Attorney General,
Attorneys for Appellee.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Filed: May 28, 1959.

PER CURIAM:

The order of the court below dismissing the plaintiff's appeal from the refusal of the Board of Finance and Revenue to review the tax settlement made by the Commonwealth's fiscal officers of the plaintiff's gross receipts tax for the year 1951, levied under the Act of June 22, 1931, P. L. 694, as amended; 72 PS § 2183 et seq., is affirmed on the following opinion of Judge Neely, to whom the case was tried without a jury.

"The Act of 1931 imposes an excise tax for the use of the highways of this Commonwealth upon companies engaged in the business of carrying passengers or property for hire over the highways of this Commonwealth, at the rate of eight mills upon the dollar upon the gross receipts of such companies. Under the statute, where a company operates over routes in interstate transportation the tax is determined by an apportionment formula. In this formula the numerator of the fraction is the number of miles operated in Pennsylvania; the denominator is the total miles operated; and the multiplicand is the gross receipts of the carrier from all of its operations.

"The parties have stipulated the facts. We adopt their stipulation as our findings of fact and incorporate the same herein by reference. In the course of our opinion we will discuss those facts which in our judgment are essential to the disposition of this case.

"The appellant is a Delaware corporation with its principal office in Detroit, Michigan. It operates over routes transversing several states, including Pennsylvania, and part of its routes in Pennsylvania are over the Pennsylvania Turnpike. The appellant is engaged in Pennsylvania exclusively in inter-state commerce in the business of transporting property by motor vehicle for hire as a common carrier

pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission.

"During the year 1951 the appellant owned two freight terminals within the Commonwealth, some personal property including motor vehicles and was engaged exclusively as aforesaid in interstate commerce. It employed no capital or property in this state otherwise than in such commerce. The appellant did not move any intrastate shipments.

"The appellant filed its gross receipts tax return for 1951 and paid the Department of Revenue the sum of $13,547.68, representing the tax on gross receipts produced by the mileage traveled over all state highways in Pennsylvania other than the Pennsylvania Turnpike. During the year 1951, appellant paid to the Pennsylvania Turnpike Commission tolls amounting to $109,324.88, representing the full charge made by the Commission for 2,883,054 miles of use of the Pennsylvania Turnpike during that year.

"The fiscal officers made a settlement of the gross receipts tax for the year 1951 in the amount of $27,381.83, the additional sum of $13,834.15 representing the tax the Commonwealth claims to be due by virtue of the appellant's mileage traveled over the Pennsylvania Turnpike. The settlement was issued by the Department of Revenue under date of September 8, 1955.

"The appellant maintains that the additional gross receipts tax claimed under the settlement cannot constitutionally be exacted because the settlement violates the Commerce Clause of the Constitution of the United States. The appellant contends that because it pays toll over the Turnpike that it cannot constitutionally be charged for the additional sum of $13,834.15, being the balance due the Commonwealth as determined by the fiscal officers. In brief, the appellant's contention is that the Act of June 22, 1931, P. L. 694, is unconstitutional as sought to be applied by the fiscal officers to the appellant's Turnpike mileage.

"It seems to us that this precise question has been disposed of in *Interstate Motor Freight System, Inc. v.*

Messner, et al., 63 Dauphin 405 (1953); *Shirks Motor Express Corporation v. Messner*, 375 Pa. 450 (1953), appeal dismissed for want of a substantial Federal question at 347 U. S. 941, re-hearing denied 347 U. S. 970. Shirks and Interstate were both appellants in that case as appealed from this Court.

"In the Shirks case the constitutionality of the Act of 1931 in its application to interstate motor carriers was upheld. Our Supreme Court, speaking through Mr. Justice Chidsey, said at page 455:

> 'It is well settled that a State does not have the power to tax interstate commerce as such: * * *. It is equally well settled that a State may, consistently with the Commerce Clause, impose upon vehicles engaged in interstate commerce a reasonable, nondiscriminatory excise tax as compensation for the use of its highways: * * *.'

"This conclusion is supported by numerous authorities: *Capitol Greyhound Lines, et al. v. Brice, Commissioner of Motor Vehicles*, 339 U. S. 542 (1950); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners of Montana, et al.*, 332 U. S. 495 (1947); *Dixie Ohio Express Co. v. State Revenue Commission, et al.*, 306 U. S. 72 (1939); *Morf v. Bingaman, Commissioner of Revenue for New Mexico*, 298 U. S. 407 (1936); *Interstate Busses Corporation v. Blodgett et al.*, 276 U. S. 245 (1928); *Clark, et al. v. Poor, et al.*, 274 U. S. 554 (1927); *Hendrick v. State of Maryland*, 235 U. S. 610 (1915).

"Interstate Motor Freight System, Inc., a Michigan corporation, appealed from our decision, 63 Dauphin 405, *supra*, alleging that the tax was unconstitutional because levied on its 'transportation over the Pennsylvania Turnpike, a State instrumentality, for which tolls are charged.' After pointing out that there was no violation of the Commerce Clause by the Act of 1931, Mr. Justice Chidsey proceeded to state, pages 460, 461:

Appellants further contend that the tax in question violates the Equal Protection Clause of the United States Constitution, and the Uniformity Clause of the Pennsylvania Constitution. This contention is based in part upon appellants' erroneous construction of the statute which has been previously referred to and which requires no additional comment, and also upon the fact that the tax is applied to gross receipts arising from use of the Pennsylvania Turnpike for which a compensatory toll is also charged. Appellants argue that a carrier who uses the Turnpike for a given number of miles of its operation must pay a toll in addition to the tax, whereas another carrier who operates for an equal number of miles but does not use the Turnpike pays only the tax, and therefore there is a lack of uniformity in the operation of the tax. The Turnpike Commission holds the legal title to the Turnpike, but only in its capacity as an instrumentality of the Commonwealth: Act of May 21, 1937, P. L. 774, Section 4, 36 PS 652d. The Turnpike is one of the public highways which cross the State of Pennsylvania in the same general locality. Two others are the William Penn Highway and the Lincoln Highway. No motor carrier is restricted to the use of the Turnpike to the exclusion of either of such other two routes. *If a motor carrier voluntarily chooses to use the Turnpike because of more economic and efficient operation, such voluntary choice cannot provide the foundation for a constitutional argument.* The choice is obviously made because the amount of the toll is less than savings in operations resulting from a shorter route, few and very slight grades which make it possible to carry loads up to the legal limit, absence of intersections and savings in fuel and time. Appellant Interstate has not shown that the tax plus the toll exceeds fair compensation for its use of the Turnpike. *A taxpayer cannot voluntarily assume a*

burden and then be heard to say that it is unconstitutional. There is no merit in this contention.' (Emphasis supplied.)

"The apt language of Mr. Justice Chidsey disposes of the appellant's contention in this case. In making use of the Turnpike appellant's 'voluntary choice cannot provide the foundation for a constitutional argument' for the reason, *inter alia*, that 'A taxpayer cannot voluntarily assume a burden and then be heard to say that it is unconstitutional.'

"It would serve no useful purpose to quote at length from our opinion in the Interstate case at 63 Dauphin 405, *supra*, wherein we disposed of many of the very contentions advanced by the appellant in this case. We refer particularly to pages 409-410-411 of that opinion.

"The Supreme Court held in the *Shirks* case that the Act of 1931, as amended, did not violate the Commerce Clause of the Federal Constitution. This ruling applied not merely to Shirks Motor Express Corporation but also to Interstate Motor Freight System, Inc., in their operation over the Pennsylvania Turnpike. We think the decision in the *Shirks* case disposes of the appellant's contention herein that the use of Turnpike mileage in the taxing formula placed an undue burden on interstate commerce. Accordingly, we hold that the tax settlement, based upon the Turnpike mileage, did not violate the Commerce Clause of the Constitution of the United States.

"The appellant contends that the Turnpike mileage should not be used in the taxing formula because the Turnpike is not a State highway. This contention is without merit.

"An examination of the applicable statute and its supplements indicates that it was intended by the Legislature that the Turnpike should become part of our State highway system. This purpose is clearly revealed in the title of the original Act of May 21, 1937, P. L. 774, 36 P. S. 652a, which reads as follows:

'Title of Act: An Act to facilitate vehicular traffic between the eastern and western sections of the Commonwealth by providing for the construction, operation and maintenance of a turnpike from a point at or near Middlesex in Cumberland County to a point at or near Irwin in Westmoreland County; providing for the creation of the Pennsylvania Turnpike Commission, and conferring powers and imposing duties on said commission; authorizing the issuance of turnpike revenue bonds of the Commonwealth, payable solely from tolls, to pay the costs of such turnpike; providing that no debt of the Commonwealth shall be incurred in the exercise of any of the powers granted by this Act; providing for the collection of tolls for the payment of such bonds and for the cost of maintenance, operation and repair of the turnpike; making such bonds exempt from taxation; constituting such bonds legal investments in certain instances; prescribing conditions upon which such turnpike shall become free; providing for condemnation; granting certain powers and authority to municipal subdivisions and agencies of the Commonwealth to cooperate with the commission; and authorizing the issuance of turnpike revenue refunding bonds.'

We believe that the statutes, *inter alia*, provide that the Pennsylvania Turnpike Commission is an instrumentality of the Commonwealth which fulfills an essential govern-

1. The Act of May 21, 1937, P. L. 774, *supra*, has been supplemented as follows:

'The Act of May 16, 1940 (Extra Session), P. L. (1941) 949, 36 P. S. 653 et seq.; the Act of June 11, 1941, P. L. 101, 36 P. S. 654 et seq.; the Act of May 23, 1951, P. L. 335, 36 P. S. Pkt. Parts 658.1 et seq.; the Act of September 27, 1951, P. L. 1430, 36 P. S. Pkt. Parts 660.1 et seq.; the Act of June 10, 1955, P. L. 157, 36 P. S. Pkt. Parts 666.1 et seq.; the Act of January 14, 1952, P. L. (1952) 1947, 36 P. S. Pkt. Parts 667.1 et seq.; the Act of July 28, 1953, P. L. 706, 36 P. S. Pkt. Parts 668.1 et seq.; and the Act of June 14, 1955, P. L. 174, 36 P. S. Pkt. Parts 669.1 et seq.'

mental function and possesses the power to issue bonds of the Commonwealth; that the Turnpike is to be maintained and repaired through the Department of Highways; and further when all bonds have been paid the Turnpike is to become part of the system of State highways and be maintained by the Department of Highways free of all tolls. The Legislature has seen fit to prescribe a speed limit for the Turnpike: Act of April 15, 1941, P. L. 17, 75 P. S. 501(7).

"In a number of appellate court decisions, the status of the Pennsylvania Turnpike Commission is defined. In *Pennsylvania Turnpike Commission Land Condemnation Case*, 347 Pa. 643 (1943), it was held that in acquiring property for the Turnpike Commission, the Commonwealth was acquiring the same through its agent, the Commission.

"In *Pennsylvania Turnpike Commission Appeal*, 351 Pa. 139 (1945), it was held that the Authority of the State Mining Commission to determine the amount of coal to be left in place under a State highway and the compensation therefor included the authority to determine the amount of coal to be left in place under a portion of the Pennsylvania Turnpike.

"In *Pickett Unemployment Compensation Case*, 177 Pa. Super. Ct. 240 (1955), an employee of the Turnpike Commission is considered to be an employee of the State.

"The Pennsylvania Turnpike Commission is an instrumentality of the Commonwealth and the Turnpike a public highway; *Shirks Motor Express Corporation v. Messner, et al.*, 375 Pa. 450, *supra*, at pages 454-460, 461. See also *Watson v. Pennsylvania Turnpike Commission*, 386 Pa. 117 (1956); *Pennsylvania Turnpike Commission v. Smith*, 350 Pa. 355 (1944).

"It is our opinion that within the meaning of the Act of 1931, as amended, the Pennsylvania Turnpike is a State highway."

Order affirmed.

FILE COPY

SEP 14
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959
No. 341

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 341

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Commonwealth of Pennsylvania, respectfully prays that the Petition for a Writ of Certiorari filed in the above entitled case be denied.

COUNTER-STATEMENT OF QUESTION INVOLVED

Where a state provides alternate highways, each of which gives access to the same points, and where one of such highways is a superior high-speed turnpike and the other is a modern, well-constructed and efficiently maintained highway, does the fact that the state charges a toll for the use of the super highway deprive the state of its power to enforce and collect a tax imposed for the use of all highways?

COUNTER-STATEMENT OF THE CASE

The Commonwealth of Pennsylvania maintains two complete systems of highways for the use of vehicles traveling within the State. The first system is composed of modern, well-constructed and efficiently maintained roads which give access to every point in the Commonwealth. Among the highways included in this system are the Lincoln Highway and the William Penn Highway. The second system is the Pennsylvania Turnpike, made up of super high-speed highways which provide a shorter route and haul than is provided by any other highway; no mountains or hills to cross, and uniformly easy grades, most of which are less than 2%. This grade makes it possible for a truck to carry loads up to the full legal limit, which they could not do in crossing the Allegheny Mountains on other highways. Curves have a minimum sight distance of approximately 1000 feet, and no curve is greater than 6 degrees. The use of the highway results in a saving of time and gasoline. The Pennsylvania Turnpike is extra safe by reason of its four twelve-foot traffic lanes and ten-feet stabilized shoulders, roadside delineators making night driving safe, no cross traffic at grades at any point.

The cost of construction and maintenance of the Turnpike with its tunnels and enormous cuts and fills, far exceeds the cost of construction and maintenance of the William Penn Highway or the Lincoln Highway. It is a matter of common knowledge that the great majority of carriers choose the Turnpike in prefer-

ence to other highways because its use is more profitable to the carrier, even after allowing for the payment of the toll.

The Pennsylvania Turnpike system is, in all cases, an alternate route for those who desire the special and extraordinary advantages provided by it. Every point reached by the Turnpike can be reached on other State roads without the payment of toll. These superior roads are available to anyone who is willing to pay an additional charge for such use through the medium of tolls. A nondiscriminatory toll is charged to all persons who use the super highway.

The Pennsylvania Gross Receipts Tax Act of June 22, 1931, P. L. 694, as amended, 72 Purdon's Pennsylvania Statutes Annotated, § 2183 et seq., imposes a tax for the use of the highways of the Commonwealth on the gross receipts of all owners or operators of motor vehicles transporting passengers and property for hire over the highways of this Commonwealth in motor vehicles or trackless trolleys.

During the year 1951, vehicles owned by petitioner traveled over State highways other than the Pennsylvania Turnpike and also over the Pennsylvania Turnpike. One-half of its total mileage was over the Pennsylvania Turnpike. It paid gross receipts tax based upon its mileage traveled over highways other than the Pennsylvania Turnpike. It denies its liability for the payment of gross receipts tax on gross receipts produced by mileage traveled over the turnpike (7a, 8a, 9a).

Petitioner paid the usual tolls charged to the Pennsylvania Turnpike Commission during the year in question.

ARGUMENT

I. The Supreme Court of the United States has held that the issue presented by petitioner does not present a substantial federal question.

The right of the Commonwealth of Pennsylvania to impose a gross receipts tax upon motor carriers who pay tolls for the use of the Pennsylvania Turnpike was definitely confirmed by your Honorable Court in the case of *Shirks Motor Express Corp. v. Messner et al.*, 375 Pa. 450 (1953); appeal dismissed for want of a substantial federal question at 347 U. S. 941; rehearing den. ed 347 U. S. 970.

The opinion of the Court in the instant case (13a, 14a) confirms this proposition:

> "It seems to us that this precise question has been disposed of in Interstate Motor Freight System, Inc. v. Messner, et al., 63 Dauphin 405 (1953); Shirks Motor Express Corporation v. Messner, 375 Pa. 450 (1953), appeal dismissed for want of a substantial Federal question at 347 U. S. 941, rehearing denied 347 U. S. 970. Shirks and Interstate were both appellants in that case as appealed from this Court.[1]

[1] The appeals to the Supreme Court of Pennsylvania in *Interstate Motor Freight System, Inc. v. Messner et al.* and *Shirks Motor Express Corporation v. Messner* were consolidated and are, therefore, reported as one case in the reports of the Pennsylvania Supreme Court and the Supreme Court of the United States.

. . . . . Our Supreme Court, speaking through Mr. Justice Chidsey, said at page 455:

. . . . . It is equally well settled that a State may, consistently with the Commerce Clause, impose upon vehicles engaged in interstate commerce a reasonable, nondiscriminatory excise tax as compensation for the use of its highways: . . . . . .

The Court continues at 15a by quoting the following language from the opinion of Mr. Justice Chidsey in the *Shirks Motor Express Corporation* case:

. . . . . Appellants argue that a carrier who uses the Turnpike for a given number of miles of its operation must pay a toll in addition to the tax, whereas another carrier who operates for an equal number of miles but does not use the Turnpike pays only the tax, and therefore there is a lack of uniformity in the operation of the tax. *The Turnpike Commission holds the legal title to the Turnpike, but only in its capacity as an instrumentality of the Commonwealth: Act of May 21, 1937, P. L. 774, Section 4, 36 PS §652d. The Turnpike is one of the public highways which cross the State of Pennsylvania in the same general locality.* Two others are the William Penn Highway and the Lincoln Highway. No motor carrier is restricted to the use of the Turnpike to the exclusion of either of such other two routes. If a motor carrier voluntarily chooses to use the Turnpike because of more economic and efficient operation, such voluntary choice cannot provide the foundation for a constitutional argument. The choice is obviously made because the amount of

the toll is less than savings in operations resulting from a shorter route, few and very slight grades which make it possible to carry loads up to the legal limit, absence of intersections and savings in fuel and time. *Appellant Interstate has not shown that the tax plus the toll exceeds fair compensation for its use of the Turnpike. A taxpayer cannot voluntarily assume a burden and then be heard to say that it is unconstitutional. There is no merit in this contention.*'"

"'The apt language of Mr. Justice Chidsey disposes of the appellant's contention in this case. In making use of the Turnpike appellant's "voluntary choice cannot provide the foundation for a constitutional argument" for the reason, inter alia, that "A taxpayer cannot voluntarily assume a burden and then be heard to say that it is unconstitutional."'" (Emphasis supplied.)

II. The record is entirely devoid of any evidence which would prove that the total amount of the gross receipts tax, plus the tolls on the Turnpike, is in excess of fair compensation for the use of the Turnpike.

The record in this case is utterly devoid of any evidence which could possibly support the conculsion that the tolls paid to the Turnpike, plus the gross receipts tax combined impose a charge in excess of fair compensation for the use of the highway.

In determining a reasonable compensation, the State may take into consideration the cost of constructing a highway: *Clark v. Poor*, 274 U. S. 554, 557 (1927); *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 250 (1928); *Aero Transit Company v. Commissioners*, 332 U. S. 495, 503, 504 (1947).

This Commonwealth is not required to compute, with mathematical precisions, the cost of constructing, maintaining and operating the Turnpike: *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 599 (1939).

Capitol Greyhound Lines v. Brice, 330 U. S. 542 (1950), upheld an act imposing a title tax of 2% of the fair market value of motor vehicles used in interstate commerce for the privilege of using the highways of Maryland. The Court stated at page 548:

> "* * * Little need be said as to the faint contention here that the taxes actually levied against appellants are in excess of a fair compensation for the privilege of using Maryland roads. * * *

The burden of proof in this respect is on a carrier who challenges a state law. Clark v. Paul Gray, Inc., 306 U. S. 583, 598-600. We agree with the Supreme Court of Maryland that here there is complete and utter lack of proof sufficient to invalidate the state law on this ground. See Dixie Ohio Co. v. Commission, 306 U. S. 72, 77-78."

To the same effect, see *Morf v. Bingaman*, 298 U. S. 407 (1936).

The gross receipts tax imposes no burden upon interstate commerce for the reason that all users of the highway, whether intrastate or interstate, pay the same tolls.

III. The petitioner has not proved that the proceeds of the tax are not used for the maintenance of the highways of the Commonwealth.

In the absence of proof to the contrary, it must be presumed that the proceeds of the gross receipts tax are used for the maintenance of the Commonwealth's highways. However, the test of constitutionality is not *how* the proceeds are used, but whether the tax represents a fair charge for the use of the highways.

Respondent contends that a state has a right to impose a tax for the use of its highways so long as the tax is fairly imposed and apportioned and represents a fair charge for the use thereof. The burden is upon the petitioner to establish the contrary before it can question the validity of the tax: *Dixie Ohio Co. v. State Revenue Commission*, 306 U. S. 72 (1939); *Morf v. Bingaman*, supra.

In *Aero Transit Co. v. Commissioners*, supra, Mr. Justice Rutledge said at page 504:

> "This does not mean, as appellant seems to assume, that the proceeds of all taxes levied for the privilege of using the highways must be allocated directly and exclusively to maintaining them. Clark v. Poor, supra, at 557; Morf v. Bingaman, supra, at 412. * * * Those cases did not hold that all state exactions for the privilege of using the state's highways are valid only if their proceeds are required to go directly and exclusively for highway maintenance, policing and administration. Both before and after the Interstate Transit decision this Court has sustained state taxes expressly laid on the privilege of using the highways, as applied to interstate motor carriers, declaring in each instance that it is immaterial whether the proceeds are allocated to highway uses or others. Clark v. Poor, supra, at 557; Morf v. Bingaman, supra, at 412."

In *Clark v. Poor*, supra, Mr. Justice Brandeis said at page 557:

> "* * * It is said that all of the tax is not used for maintenance and repairs of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

Motor truck carriers must pay this tax as compensation for use of highways, irrespective of how much money the Commonwealth has in its treasury, or to what particular fund or funds the money is credited.

Otherwise, if a state has paid in full the cost of construction and has ample funds for the maintenance of all its highways, a foreign motor carrier could use the roads of the state and wear them out without having to pay anything.

The language of the Court in *Aero Transit Co. v. Commissioners*, supra, at pages 503 and 504, confirms the right of the states to impose proper charges for the use of its highways:

> "• • • Motor carriers for hire, and particularly truckers of heavy goods, like appellant, make especially arduous use of roadways, entailing wear and tear much beyond that resulting from general indiscriminate public use. Morf v. Bingaman, supra, at 411. Although the state may not discriminate against or exclude such interstate traffic generally in the use of its highways, this does not mean that the state is required to furnish those facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects. Ct. Clark v. Poor, supra; Morf v. Bingaman, supra at 411. Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways."

CONCLUSION

There is no evidence in the record that would justify any argument that the gross receipts tax plus the toll charge represents more than a fair and just compensation for the use of the Turnpike. The fact that so many truckers use it fortifies this argument, particularly in view of the fact that other highways are available within the Commonwealth which could be used without any toll or other charge. The use of the highway is entirely optional.

There is no evidence in the record as to what sum would represent a fair charge or compensation for the use of the Turnpike or any other highway within the Commonwealth. In this connection, it is significant that Pennsylvania has imposed taxes ranging from eight to twenty-eight mills per annum upon the gross receipts of railroads apportioned according to mileage in Pennsylvania. See *Lehigh Valley Railroad Co. v. Commonwealth*, 145 U. S. 192. These railroads provide their own road beds at great cost. Motor carriers are furnished highways built and maintained at public expense.

The gross receipts tax is a charge for the use of all the highways of the Commonwealth, regardless of whether they be free or toll roads. The choice as to route is entirely that of the trucker who uses it. The toll is merely additional compensation for the many unusual benefits received from the use of the super highway.

Respondent submits that in its decision the Pennsylvania Supreme Court has correctly interpreted, applied and followed the ruling cases of this Court; that your Honorable Court's previous conclusion that the case presents no substantial federal question is conclusive upon petitioner and that the Petition should, therefore, be denied.

Respectfully submitted,

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